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Supreme Court of the United States

OCTOBER TERM, 1943

NO. 568

TERRY LINNELL HARPER, Petitioner

versus

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT

COUNSEL FOR PETITIONER:
Colon J. Cogdell, Brunswick, Ga.
H. F. Rawls, Nahunta, Georgia.

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays, through his counsel, that the writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals, Fifth District, in the above case, entitled No. 10620, in the United States Circuit Court of Appeals, Fifth Circuit. Final judgment in said case in the United States Circuit Court of Appeals was rendered and entered on the 18th day of October, 1943. The motion for a rehearing was denied on December 3rd, 1943, the opinion and decision in question affirming the judgment of the trial court.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 3, 1943. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. In a trial for a failure to report as a conscientious objector for induction under civilian direction, where the defendant's sole defense is that the order directing him to report is invalid because the facts in his particular case do not justify the issuance of such an order, is the defendant under the Selective Training and Service Act of 1940, as amneded, entitled to have the jury try de novo the merits of his classification under the Act?

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, and the Sections of the Constitution of the United States, are hereinafter set forth and properly referred to.

STATEMENT

Petitioner was indicted on the 9th day of February, 1943, in the United States District Court for the Southern District of Georgia, in one count charging that, having been classified in Classification IV-E by his Local Board at Hazlehurst, Georgia, being a registrant under the Selective Training and Service Act of 1940, he did unlawfully and willfully fail and neglect to report as assigned by said Local Board to work of national importance under civilian direction. (R. 2).

To this indictment petitioner, a Jehovah Witness, entered his plea of not guilty under the contention that he was a "duly ordained minister" and consequently should have been placed in Classification IV-D, under which classification he was not duty bound to report as ordered for the reason that as such recognized minister under Classification IV-D the only duty resting on him was that of registering. Through his counsel, petitioner, in the trial court, contended that the Local Board acted arbitrarily and capriciously, thereby giving him a valid reason for failure to report for induction (R. 60). The Government contended that the Local Board was the proper tribunal to determine the classification of registrant and its determination of this fact was conclusive on all parties concerned, and not subject to review.

Upon conclusion of the evidence, which included certain facts touching the action of the Local Board in arriving at its classification, the trial court, upon motion of the Assistant District Attorney, excluded from the consideration of the jury all evidence, documentary and otherwise, respecting the findings of the Local Board.. (R. 213).

The record further shows that the trial judge instructed the jury in excluding from its consideration all evidence touching the actions of the Local Board in classifying registrant, that the evidence did not sustain petitioner's contentions that

the Board did act in an arbitrary and capricious manner. (R. 200).

Petitioner contended and here and now contends that the Selective Training and Service Act of 1940, as amended, does not vest in the trial judge the right, power, and authority to arbitrarily make such findings and so instruct the jury and, in the absence of such power and authority, the right and power to determine such rests solely in the hands of the jury.

At the time said motion was made to exclude from the consideration of the jury all evidence touching the findings of the Local Board, petitioner, through his counsel, stated to the Court that to exclude from the jury the right to go behind the decision of the Local Board would sweep from petitioner his only defense to the indictment; that to so hold would be equivalent to recognizing the fact that petitioner had already been convicted of the offense charged in the indictment through the holding of the local board; and that to so hold and rule on the part of the trial court would deprive petitioner of his constitutional rights to a jury trial, would be in direct conflict with the "due process" clause, and would deprive petitioner of his religious freedom, all as set out in the Federal Constitution. (R. 114).

Upon the ruling of the Court, as aforesaid, the case as submitted to the jury resulted in the conviction of petitioner on the 10th day of March, 1943.

Thereafter, on the 14th day of July, 1943, a Bill of Exceptions was filed to the United States Circuit Court of Appeals, Fifth District, and on the 18th day of October, 1943, that court rendered its decision affirming the judgment of the trial court.

On the 8th day of November, 1943, a motion for a rehearing was filed in the United States Circuit Court of Appeals, Fifth Circuit, and on the 3rd day of December, 1943, said motion for a rehearing was denied.

On the 16th day of December, 1943, the United States Circuit Court of Appeals stayed the mandate of the lower court and allowed notice of Certiorari to the Supreme Court of the United States.

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

1. It was an error on the part of the lower court to exclude from the consideration of the jury all evidence touching the holding of the Local Board, an administrative agency, and thereby prevent a review of the actions of the administartive agency, particularly in view of the contentions of petitioner that said Board acted in an arbitrary and capricious manner and in clear violation of his constitutional rights. And the ruling of the trial court, as aforesaid, touching the construction and applicability of Federal laws and Federal procedure, involves the following reasons, on which petitioner relies for the allowance of this writ of certiorari:

(A) That the Supreme Court of the United States has never passed upon the question involved in the within petition with reference to the application of the Selective Training and Service Act of 1940, as amended, and, due to their being no direct decision from this Court, wide-spread confusion prevails touching the applicability of same;

(B) That the Supreme Court of the United States has held that administrative agencies are subject to a review of their findings in cases other than Selective Service cases, in which the same principle of law is recognized as sound and proper.

Union Bridge Co. V. United States
(204 U. S. 364)
Monongahlea Bridge Co. V. United States
(216 U. S. 177)

The ruling of the Supreme Court in the cases cited is in direct conflict with the ruling of the trial court in the instant case.

(C) That numerous District Courts over the United States have adhered to decisions similar to the trial court in the pending case, all of said decisions of said District Courts being in direct conflict with the decision of the Supreme Court of the United States as hereinbefore set out, viz:

Fletcher v. United States
(129 Fed. 2nd 262)
(5th C. C. A.)

Johnson v. United States
(126 Fed. 2nd 242)
(8th C. C. A.)

United States v. Grieme
United States v. Sadlock
(128 Fed. 2nd 811)
(3rd C. C. A.)

Rase v. United States
(129 Fed. 2nd 204)
(6th C. C. A.)

Buttecalli v. United States
(130 Fed. 2nd 172)
(5th C. C. A.)

These cases present a confused situation that should be settled, once and for all, by the Supreme Court of the United States.

(D) It is to be noted that the presiding judge held that no constitutional rights of petitioner were violated or impaired. (R. 208).

WHEN THE CONSTITUTIONAL QUESTIONS WERE RAISED AND HOW

All the constitutional questions herein set out were urged and insisted upon by petitioner in the trial court, in his bill of exceptions of the United States Circuit Court of Appeals, and petitioner here and now insists upon same in this Court.

WHEREFORE, petitioner prays that this petition for writ of certiorari to reviewed the judgment of the United States Circuit Court of Appeals, Fifth Circuit, in case numbered and entitled on its docket No. 10620, Terry Linnell Harper versus United States of America, be granted and that the United Circuit Court of Appeals, Fifth Circuit, be notified of the filing of this petition and action taken thereon, to the end that said cause may be reviewed and determined by this Court and that the judgment of the United States Circuit of Appeals, Fifth Circuit, in said case may be reversed, and that

petitioner have such other and further relief to which he may be entitled in the premises.

Respectfully submitted,

Colon J. Cogdell, Brunswick, Ga.
H. F. Rawls, Nahunta, Georgia.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO._____

TERRY LINNELL HARPER, Petitioner

versus

UNITED STATES OF AMERICA, Respondent

Certiorari from the decision of United States Circuit Court of Appeals, Fifth Circuit, Case No. 10,620

BRIEF IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT

OPINION OF THE COURT

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is found in the record filed herewith. (R. 239-241).

JURISDICTION

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

The date of the judgment complained of in the United States Circuit Court of Appeals for the Fifth Circuit is October 18, 1943, and a motion for rehearing was made to the United States Circuit Court of Appeals for the Fifth Circuit, as provided and within the time allowed by law, which motion for rehearing was denied by the United States Circuit Court of Appeals for the Fifth Circuit on December 3, 1943. The final decision of the United States Circuit Court of Appeals for the Fifth Circuit herein complained of is of the date of December 3, 1943.

ARGUMENT

The most important question involved in this certiorari is the judicial power of review touching the action, conduct and findings of an administrative or quasi-judicial body, board, or commission.

The Supreme Court of the United States has laid down the rule that whenever an administrative body created by the legislature acts within the sphere of its authority in a fair and unprejudiced manner, its findings are not subject to collateral attack or judicial review of the civil courts; but where a fair hearing has been denied, where the board has violated the rules specifically ordering its conduct, where the administrative body has acted unfairly, arbitrarily and capriciously and there is a deprivation of rights either of person or property, the acts will be reviewed by the court, and the judiciary will not be ousted by any legislative arrangement designed to preclude judicial determination.

In the case of St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 49 to 54, the Court entertained jurisdiction for the review of the findings of the Secretary of Agriculture on the allegation that the rates fixed were confiscatory despite the insistence on the part of the government agency that such findings are not subject to review. The Court said on that occasion:

> "When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of facts which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in accordance to fair hearing and acting upon evidence and not arbitrarily. Interstate Commerce Commission v. Louisville & Nashville Ry. Co., 227 U. S. 88, 91; Virginia Ry. Co. v. United States, 272 U. S. 658, 663; Tagg Bros. & Moorhead v. United States, supra, P. 444, Florida v. United States, 292 U. S. 1, 12."

Where, however, the administrative body has been unfair, arbitrary and capricious to the deprivation of the rights of either person or property, or both, without due process of law

and thus overstepping the Constitutional guarantees and the provisions of the general law, as in the instant case, then the courts will review and rectify the matter. Continuing in quoting from the same opinion we read the following:

> "But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitations by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subserviant. It is not difficult for them to observe the requirements of the law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."

In accordance with the above statement the regulations prescribing the actions of the Selective Service System cannot preclude and prevent juricial review by the statement that the action of the Local Board shall be final, when there is unfairness, arbitrariness and capriciousness involved in

the classification as in the instant case; also the Court will take jurisdiction in reviewing the case where the Local Board has over-stepped the bounds of the regulation in several instances. If this were not so, then the Constitutional guarantees would be of little worth.

The Supreme Court of the United States in the case of Interestate Commerce Commission v. Louisville and Nashville Ry. Co., 227 U. S. 88, 91, clearly indicates the result of an unfair and inadequate hearing before an administrative board. It said:

> But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficially expressed in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'. Tang Tun V. Edsell, 223 U. S. 678, 681; Chin Yoh v. U. S. 460, 468; Zakonaite v. Wolf, 226 U. S. 272; or if the facts found do not, as a matter of law, support the order made, United States v. B. & O. S. W. RR, 226 U. S. 14; Cf. Atlantic C. L. v. North Carolina Corp. 179 U. S. 287, 301; Oregon Railroad v. Fairchild, 224 U. S. 510; I. C. C. v. Illinois Central 215 U. S. 452, 470;

Southern Pacific Co. v. Interstate Com. Comm., 219 U. S. 433; Muser v. Magone, 155 U. S. 240, 247."

It is true that in a criminal action such as this the court is not empowered to dictate to the local board as to what it should do, but certainly this court has a right to decide whether or not the Petitioner has been deprived of his legal defense when the local board has acted arbitrarily and capriciously toward Petitioner.

In the case of Union Bridge Company v. United States, 204 U. S. 364, a criminal prosecution was instituted against a bridge company for its failure to obey the order of the Secretary of War to remove an obstruction to navigation by making higher a bridge. This order of the Secretary of War was made pursuant to the power vested in him by Section 18 of the Act of March 3, 1899, (30 Stat. at L. 1121, 1153). The Secretary gave notice, conducted hearings, considered the evidence, and then made his order. Upon the company's failure to comply, the United States Attorney in the District was notified and a criminal prosecution was instituted. (Note the similarity in procedure to that under the Selective Training and Service Act.) In deciding that the Act did not improperly delegate authority to the Secretary of War, the court pointed out that the Act did not give the Secretary arbitrary power but only the power to act reasonably. Said the court significantly:

> " . . . . . Nor is there any reason to say that the Secretary of War was not entirely justified, if not compelled, by the evidence in finding that the bridge in question was an unreasonable obstruction to commerce and navigation as now conducted."

Again in Monongahlea Bridge Co. v. United States, 216 U. S. 177 (1910) the same objections were raised as in the Union Bridge Case. The Court decided similarly, observing:

> "It does not appear that the Secretary disregard the facts, or that he acted in an arbitrary manner, or that he pursued any method not contemplated by Congress."

Thus the Court observed that arbitrariness on the part of the Secretary of War was a proper matter of defense.

Looking into the future, when counsel suggested extreme cases of arbitrariness, the court commented, at page 195:

> "It will be time enough to deal with such cases and when they arise. Suffice it say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

It can thus be seen from the above, although dicta, that the Supreme Court was of the opinion that if it were shown that the action of the administrative officer were arbitrary, such evidence would be considered by the court in a criminal prosecution, in determining whether the defendant's constitutional rights had been abridged.

In two other cases involving enforement of administration determinations, although not criminal prosecutions, the Supreme Court has indicated that administrative arbitrariness is a defense to enforcement proceedings.

In Hagar v. Reclamation District No. 108, 111 U. S. 701 (1884), the Court said:

> " . . . . The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded."

Again in Bradley v. City of Richmond, 227 U. S. 477, (1913), another administrative enforcement action, the Court commented:

> " . . . . . Obviously the burden was upon the plaintiff in error to show an illegal and capricious classification."

See also in this connection St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 49 to 54; Interstate Commerce Commission v. Louisville & Nashville Ry. Co., 227 U. S. 88, 91, Virginia Ry. Co. v. United States, 272 U. S. 658, 663; and Florida v. United States, 292 U. S. 1, 12.

Applying the facts in the instant case to the law laid down in the foregoing citations, Petitioner contends that the action of the Local Board, empowered to classify him, was palpably unfair, unreasonable, unjust, arbitrary, capricious, improper, and contrary to the provisions of the Selective Service Act. There is not one single, solitary word in the record showing that the Local Board at any time ever gave a formal consideration to the contentions of registrant that he was entitled to be placed in Classification IV-D.

Petitioner submits that the ruling of the Court deprived him of his constitutional right of a trial by jury, in that under said ruling the local draft board and/or appeal board had previously adjudicated all facts touching defendant's only defense to the indictment in the instant case. To so hold, to allow defendant to be convicted by a board and estop him from going into the findings of said board, would clearly be contrary to all fundamentals of the Constitution and statutory laws. There are no such things as estoppels touching criminal defenses. For the Constitution to guarantee to a defendant the right of a jury trial and, when a defendant demands such right he is met with the propsition that some board or some committee has already adjudicated the controlling factors in his trial, certainly the guarantee is without force or effect of any kind.

Petitioner submits, further, that under the ruling of the trial court in the instant case, as set out, he was denied his constitutional right as set out in the Sixth Amednment to the Federal Constitution: "In all criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . . ", in that petitioner instead of having his guilt or innocence determined by a jury, was found guilty of the offense charged by an administrative board consisting of three members several weeks prior to his arrangement under the indictment in the instant case.

Further, petitioner was denied "due process" as guaranteed him in the Fourteenth Amendment of the Federal Constition.

That section of the Selective Training and Service Act of

1940, as amended, particularly pertinent to the determination of the within case reads as follows:

> 601.5 Delinquent. A 'delinquent' is (1) any man required under the Selective Service Law and direction given pursuant thereto to present himself for and submit to registration on a certain day fixed by the President who fails to so present himself for and submit to registration on that day and has no valid reason for having failed to perform that duty; or (2) any registrant who, prior to his induction into military service, fails to perform, at the required time or within the allowed period of given time, any duty imposed upon him by the Selective Service Law and directions given pursuant thereto and has NO VALID REASON for having failed to perform that duty."

From the above and foregoing Section, it is plain that Congress envisioned the possibility of a registrant possessing some VALID REASON for a refusal to report. Further, it is clear, in the absence of other provisions, that Congress had in mind the right and power on the part of the registrant to assert this VALID reason after all procedural steps had been taken by the Local Board. There remained but one place, and one place only, under the Act, where the registrant could assert his valid reason for not reporting. In the absence of some provision in the Selective Service Act giving to some specified tribunal the power to dispose of this vested right, petitioner submits that the trial jury itself was the only source through which petitioner could have his day in court. For the trial judge to usurp the power and authority to determine this "valid reason" would be a mere nullity, and a rank violation of petitioner's constitutional right to a jury trial.

We respectfully submit that the certiorari prayed for should be granted, and the case remanded for another trial, and the judgment in this case reversed and set aside.

Respectfully submitted,
Colon J. Cogdell, Brunswick, Ga.
H. F. Rawls, Nahunta, Georgia.

State of Georgia
County of Glynn

I, Colon J. Cogdell, of counsel for petitioner, do hereby certify that I have this day served a copy of the within petition and brief upon respondent, United States of America, by giving a copy of same to the Attorney General of the United States, Washington, D. C.

This the 31st day of December, 1943.

COLON J. COGDELL



No. 568

In the Supreme Court of the United States

OCTOBER TERM, 1943

TERRY LAVINIA HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 568

TERRY LINNELL HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was indicted in the District Court for the Southern District of Georgia for wilfully and knowingly failing to perform a duty required of him under the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U. S. C. App. 301–318), in that he failed to report for work of national importance as required by an order duly issued to him by his local Selective Service board pursuant to his classification in Class IV–E as a conscientious objector to both combatant and noncombatant military service (R. 2–4).

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At his trial before a jury the court permitted petitioner to adduce evidence in support of his contention that as a member of Jehovah's Witnesses he was a minister of religion and therefore wholly exempt from training and service under the Act (see R. 115–127, 148–158, 165–169, 186–188). At the close of the evidence, outside of the presence of the jury (R. 196), the judge ruled that there was substantial evidence supporting petitioner's classification in Class IV-E (R. 199) and that there was no evidence that his classification was arbitrary or capricious (R. 200). Accordingly, the judge instructed the jury that petitioner's classification was final and conclusive upon the court and the jury (R. 213) and that the only issues of fact open for the jury's consideration were whether petitioner was commanded by lawful authority to report for work of national importance and whether he knowingly refused to report (R. 218).

Petitioner was convicted (R. 4) and sentenced to three years' imprisonment (R. 5–6). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit the conviction was affirmed (R. 238–240).

Petitioner's sole contention here is that he was entitled to have the jury try *de novo* the merits of his classification (Pet. 1, 3, 4, 8–14). That contention is no longer open in view of the

decision of this Court in *Falbo* v. *United States*, No. 73, decided January 3, 1944.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JANUARY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944